U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

D2

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 03 2010

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition the petitioner stated that it is a nonprofit business. In order to employ the beneficiary in a position it designates as an Electrical Engineer – Research and Development position, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that its approval is barred by the numerical cap on H-1B visa petitions. On appeal, the petitioner asserted that the petitioner is exempt from the numerical cap. In support of that contention, the petitioner submitted additional evidence.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and exhibits submitted with the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act., the total number of H-1B visas issued per fiscal year may not exceed 65,000. The petition was filed for an employment period to commence in November 2008. The 2009 fiscal year (FY09) extends from October 1, 2008 through September 30, 2009. The instant petition is therefore subject to the 2009 H-1B cap, unless exempt.

Further, on April 8, 2008, U.S. Citizenship and Immigration Services (USCIS) issued a notice that it had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY09. The petitioner filed the instant visa petition on November 13, 2008. Unless this visa petition is exempt from the cap, therefore, it cannot be approved. At issue in this matter, therefore, is whether the beneficiary qualifies for an exemption from the FY09 H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

Section 214(g)(5) of the Act states, in pertinent part:

> The numerical limitations . . . shall not apply to any nonimmigrant alien issued a visa or otherwise provided [H-1B status] who –

> (A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20), or a related or affiliated nonprofit entity.
>
> (B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or
>
> (C) has earned a master's or higher degree from a United States institution of higher education . . . until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

The record contains no evidence that the petitioner in this matter is an institution of higher education, a related or affiliated nonprofit entity, or a governmental research organization. Further, the record contains no indication that the beneficiary has earned a master's or higher degree from a United States institution of higher education. The petitioner makes no such claims. Instead, the petitioner claims exemption from the cap as a nonprofit research organization within the meaning of section 214(g)(5) of the Act. The result in this case hinges on whether the petitioner has demonstrated that it is, in fact, a nonprofit research organization.

The regulation at 8 C.F.R. § 214.2(h)(19)(iii)(C) states, in pertinent part, "A nonprofit research organization or governmental research organization is an organization that is primarily engaged in basic research and/or applied research."

The record in the instant case demonstrates that the petitioner has an interest, either real or contemplated, in a project to test the feasibility of farming tilapia, a finfish, in an area of the Philippines. That could certainly be regarded as applied research. The petitioner also has an interest, real or contemplated, in investigating the potabililty of well water in the Philippines. That, too, could be construed as applied research.

The record contains proposals for grants that the petitioner purports to be considering awarding. Whether the petitioner awarded any grants is unclear. Other documents submitted indicate that the petitioner operates a scholarship program. The record contains a document that indicates that the petitioner offers services to immigrating teachers, tutoring, translation services, and English as a Second Language teachers. Translating, teaching, tutoring, and awarding grants and scholarships is neither basic nor applied research.

The record contains various documents that indicate that the petitioner acquired a for-profit enterprise, specifically, [redacted], an employment agency. Operation of that company is not basic research or applied research.

The evidence in the record does not demonstrate that the petitioner is primarily engaged in basic research and/or applied research. As such, the petitioner has not demonstrated that it qualifies as a

nonprofit research organization within the meaning of section 214(g)(5)(B) of the Act. Therefore the petitioner is subject to the cap. Because the instant petition was submitted after the cap was filled, it cannot be approved. The appeal will be dismissed and the petition will be denied.

The record suggests an additional issue that was not addressed in the decision of denial. The record does not contain an approved labor condition application (LCA). The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states:

> Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a (LCA) in the occupational specialty in which the alien(s) will be employed.

Because the RFE issued in this matter did not specifically request that the petitioner provide that missing evidence, today's decision does not rely on that omission as any part of its basis. The AAO notes, however, that even if the visa petition were otherwise approvable, it could not be approved absent a corresponding LCA approved before the petitioner filed the instant visa petition.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

ORDER: The appeal is dismissed. The petition is denied.